JUN 16 1964

IN THE

# SUPREME COURT OF THE UNITED STATES

TERM, 1964

No. 1063

DEAN D. HILL, COUNTY AUDITOR OF CLARKE COUNTY, IOWA; GEORGE T. NICKLES, COUNTY AUDITOR OF WAYNE COUNTY, IOWA; AND ALBERT DRAKE, COUNTY AUDITOR OF RINGGOLD COUNTY, IOWA,

*Appellants,*

vs.

CHARLES L. DAVIS AND ARTHUR J. LEWIS,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

## BRIEF IN OPPOSITION TO MOTION TO DISMISS AND/OR AFFIRM

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## REPORTS AND OPINIONS BELOW

The Reports and Opinions below are set forth at page 2 of the Jurisdictional Statement now on file in this case.

The Final Order here sought to be reviewed is set out in Appendix I of the Jurisdictional Statement. Appendix II of the Jurisdictional Statement contains a previous Judgment Entry, and the Memorandum Opinion filed with the previous Judgment Entry is now reported in 217 F. Supp. 492 (S.D. Iowa 1963).

## GROUNDS FOR APPELLATE JURISDICTION

The basis of the jurisdiction of the United States Supreme Court in this case is set forth in the Jurisdictional Statement of these Appellants at pages 3-6 thereof.

The Final Order here sought to be reviewed was made and entered herein on January 14, 1964. Notice of Appeal to the Supreme Court of the United States was filed by these Appellants in the United States District Court for the Southern Division of Iowa on March 9, 1964, said Notice of Appeal being filed within the sixty days prescribed by 28 U.S.C., Section 2101(b).

This Appeal was taken pursuant to provisions of the act of June 25, 1948, c. 646, 62 Stat. 926, 28 U.S.C., Section 1253. This is an Appeal from an order granting, after hearing, a permanent injunction in a civil action required by law to be heard and determined by a District Court of Three Judges.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State Constitutional and Statutory Provisions involved in the merits of this case are set forth at pages 5-6 of the Jurisdictional Statement now on file.

This matter is now before the Supreme Court of the United States on the Jurisdictional Statement of these Appellants, on the Motion to Dismiss and or Affirm of the Appellees, and on the Brief now being presented in resistance to the Appellees' Motion to Dismiss and or Affirm For purposes of determining the jurisdiction of the Court, the following Federal Statutory Provisions are also applicable: Act of June 25, 1948, c. 646, 62 Stat. 926, 28 U.S.C., Section 1253.

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an Order granting or denying, after Notice and Hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of Three Judges".

Act of June 25, 1948, c. 646, 62 Stat. 961, 28 U.S.C., Section 2101(b).

> "Any other direct Appeal to the Supreme Court which is authorized by law, from a decision of a District Court in any civil action, suit or proceedings, shall be taken within thirty days from the Judgment, Order or Decree, appealed from, if interlocutory, and within sixty days if final".

Act of June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C., Section 2281.

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an Order made by an administrative board or commission acting under State statutes, shall not be granted by any District Court or Judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and

determined by a District Court of Three Judges under Section 2284 of this Title".

## QUESTIONS PRESENTED FOR REVIEW

The questions to be ultimately presented to the United States Supreme Court on this Appeal are set forth in the Jurisdictional Statement at pages 7-8.

The questions to be determined by the Supreme Court of the United States in deciding whether to note probable jurisdiction of this case are as follows:

(1) Is the Judgment Entry set forth at pages A8-A10 of the Jurisdictional Statement, filed on January 14, 1964, a Final Order within the meaning of 28 U.S.C., Section 2101(b)?

(2) Does the Final Order of January 14, 1964, meet the requirements of 28 U.S.C., Section 1253, pertaining to direct appeals to the Supreme Court of the United States from a District Court of Three Judges?

(3) Are the ultimate questions presented by the Appeal, as set forth at pages 7-8 of the Jurisdictional Statement so unsubstantial as to not require further argument or decision?

## STATEMENT OF THE CASE

The statement of the case to be ultimately presented to the Supreme Court of the United States appears at pages 8-12 of the Jurisdictional Statement. The further question presented at this time is whether the Judgment Entry of the Three-Judge Court filed on January 14, 1964, is such a Final Order as would fall within the provisions of 28 U.S.C., Section 2101(b), permitting the period of

sixty days to pass during which time a Notice of Appeal may be filed. The further question raised by the Appellees in their Motion to Dismiss and or Affirm is whether this Judgment Entry, as set out in Appendix I of the Jurisdictional Statement, falls within the scope of those Judgments from which a direct Appeal to the Supreme Court of the United States is permitted by 28 U.S.C., Section 1253. The Appellees further raise the question as to whether the ultimate questions to be presented to the Court are so unsubstantial as to not require further presentation, argument or decision.

## ARGUMENT AND AUTHORITIES

### (a) Is a Substantial Question Presented?

The appellants will first dispose of the absurd contention of the appellees that no substantial question is presented by this Appeal.

The appellees, themselves, instituted this assault on the solemn Constitution of the people of the State of Iowa, by filing a complaint, which is twenty-seven pages in length. Thereafter, the appellees added a further Amendment of four pages to their complaint. The complaint alleges that the constitutional provisions of the State of Iowa, pertaining to the apportionment of the State Legislature are void and invalid as against certain provisions of the Federal Constitution. A period of several days was spent in the Court Room during the hearings on the Motions, trial, and various other hearings in the case in the Three-Judge District Court. A considerable amount of labor union money was spent in financing these appellees through this lawsuit. The question was obviously not unsubstantial when presented to the Federal District Court.

The questions presented to the District Court, and now on Appeal to this Court, involve the validity of duly adopted Amendments to the Constitution of the State of Iowa, and the Legislative Acts enacted pursuant thereto. The legal questions involved include the scope of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and more specifically whether that clause requires one or both Houses of a bi-cameral State Legislature to be apportioned solely upon the principle of strict numeral equality of population among representative districts. This Appeal further involves the question of whether a Federal Court may declare duly adopted State Constitutional provisions to be prospectively null and void when they may have been, at the time of their adoption, perfectly valid, and may have been perfectly valid for many years thereafter. This Appeal further involves the question of whether a Federal Court may impose upon the people of a State a new apportionment system in compliance with its own announced minimum standards by threat of judicial intervention or judicial apportionment when fully admitting that it has no guides from its superior Federal Courts.

As the members of this Honorable Court are well aware, the apportionment decisions of the various Three-Judge Federal District Courts across the country are in great conflict and turmoil. The appellees, themselves, admit at Page 8 of their Motion to Dismiss and or Affirm that the decision of the Three-Judge Court as indicated by its findings rested its finding of invidious discrimination solely upon the naked numbers involved.

While it is true that there are several other apportionment cases presently pending before this Honorable Court, it is also clear and true that the decisions in these cases will have no bearing whatsoever upon the validity of the

Iowa Constitution as it was enacted by the people of the State of Iowa, and as it existed before the decision now being appealed from. Should this Court refuse to note probable jurisdiction in the Iowa case, then the decision of the Three-Judge Court will be *res adjudicata* as far as the existing Iowa Constitution is concerned. It is true that the decisions of the cases now pending will give some guide to further minimum Federal standards, but that has nothing to do with the Order now being appealed from. It is the belief of these appellants that their Constitution is just as sacred as the Constitution of the States of New York or Maryland or Colorado or any of the other fifty sovereign States. It is likewise the belief of these appellants that the people of the fifty States have a right to determine their own legislative apportionment as long as it meets whatever minimum standards may be required by the provisions of the Constitution of the United States.

These appellants believe that the questions to be ultimately presented to the Court are so substantial and so important to all of the people of the State of Iowa, that they should not, at this point, be so lightly dismissed by these appellees who have, themselves, expended so much time and money, nor should they be lightly dismissed by this Court.

**(b) Was the Judgment Entry a Final Injunctive Order?**

The Order being appealed from and now being attacked by the appellees as not being a final order is set forth at pages A8-A10 of the Jurisdictional Statement.

Before looking at this Judgment Entry, itself, it is important to review the background of this case and the parties against whom it was brought, as well as the relief demanded by the appellees' Complaint. The defendants

in this case were the Governor, the Lt. Governor, the Secretary of State, the Auditor of State, the Treasurer of State, and the Secretary of Agriculture of the State of Iowa, in their elective capacities, and also collectively and individually as the Executive Council of the State of Iowa, the Attorney General, and twelve County Auditors in their individual and class capacities. The Attorney General of the State of Iowa is, under the Iowa Constitution, a member of the Judicial branch of Government, and all of the other persons named defendants are members of the Executive branch of Government. Not a single member of the Legislative branch of the Government was named a defendant to this lawsuit, with the exception that the Lt. Governor does preside over the Senate of the State of Iowa, but he is, nevertheless, a member of the Executive branch of Government.

The appellees in their Complaint specifically request that a special Three-Judge Court be called to hear and determine this cause as by law provided in 62 Stat. 968, 28 U.S.C., Section 2281. The appellees specifically request that the Court declare their rights and restrain the defendants from holding any further elections under the then existing Iowa Laws, and further ask for such other relief as may seem proper in the case. As is apparent from the state of this Appeal, a Three-Judge Court was called in compliance with the request of the appellees. It is clear that a Three-Judge Court would not and could not have been called unless these appellees were seeking injunctive relief. 62 Stat. 968, 28 U.S.C., Section 2281.

Pursuant to the Complaint of the appellees and the relief demanded therein, the case proceeded through various stages of hearing and trial, and eventually on January 14, 1964, a Judgment Entry was made therein.

Turning to the Judgment Entry, itself (Jurisdictional Statement, pp. A8-A10), an examination thereof discloses that injunctive relief was in fact granted, just as these appellees had requested, in both the form of a prohibitory and a mandatory injunction. The first paragraph of the Judgment Entry finds that the Three-Judge Court was duly constituted and that it has jurisdiction of the subject matter and the power to decide the controversy presented. Were an injunction not in question, the Three-Judge Court would not have been and could not have been appointed.

Turning now to Paragraphs 2 and 3 of the Judgment Entry being appealed from, and bearing in mind that the parties against whom this suit was brought are all persons having to do with the elective rather than the legislative process, and bearing in mind the injunctive relief sought by the appellees and the basis on which the Three-Judge Court was convened, it is perfectly obvious that the relief granted is in fact injunctive even though the words "prohibited" or "injunction" do not appear therein. While it is perfectly true that the Judgment Entry does not state that a Writ of Injunction should issue, yet it is equally true that a Writ of Injunction never issues in a Final Decree, when the parties are before the Court. These appellants do not believe that their right of direct appeal to the Supreme Court of the United States from a final Order of a Three-Judge Court, convened at the request of the complainants, the appellees now before the Court, can be denied them simply on the basis that the words "injunction" or "prohibited" or some similar word is not used when, in fact, the relief granted is exactly the relief sought by the appellees in their Complaint, and the basis on which Federal jurisdiction was assumed and a Three-Judge Court appointed at their request.

The practical effect of Paragraphs 2 and 3 of the Judgment Entry being appealed from is clearly to prevent these various public officers of the State of Iowa, who are charged by the laws of Iowa with the duty of administering the election process, from proceeding to hold their elections on the basis which the Constitution of the State of Iowa and the various laws and Statutes enacted pursuant thereto, require them to do. It would be extremely difficult to imagine how the intention of the Three-Judge Court could be expressed any more clearly, and it is likewise apparent that the Three-Judge Court was attempting to exercise the utmost judicial restraint in the phrasing of its Judgment Entry in the interests of State-Federal relationships and in the interests of judicial-executive relationships.

Turning now to Paragraphs 4, 5 and 6 of the Judgment Entry being appealed from, and bearing in mind the things above mentioned, these paragraphs clearly constitute a mandatory injunction. It must be remembered that the Governor of the State of Iowa was here joined as a party defendant in his elective capacity as Governor, and that in such capacity, he has the authority to call a special session of the State Legislature, which he did in fact do very shortly after the issuance of the Judgment Entry of January 14, 1964. These appellants do not believe that the Governor was joined as a party defendant to this suit simply for the nuisance value of doing so, and they do not believe that it was purely coincidence that the Governor, a defendant to this suit, should convene a special session of the State Legislature shortly after the entry of this Judgment against him as a defendant. At Page A6 of the Jurisdictional Statement, the Three-Judge Court states in its Memorandum Opinion: "The Legislature should at once adopt an apportionment plan which conforms to Federal Constitutional requirements, and place the same in ef-

fect in time for this year's elections." Reading this mandate in conjunction with Paragraph 4 of the Judgment Entry, found at Page A9 of the Jurisdictional Statement, it is difficult to conceive how much more mandatory a Court Order could be. These appellants do not believe that the Federal Three-Judge Court could have, itself, entered an Order convening the State Legislature to meet in special session, but that this Order, together with the directives contained in the Judgment Entry and the Memorandum Opinion prescribing the minimum standards which this particular Three-Judge Court would accept, clearly amount to a mandatory injunction against the defendants. It must be remembered that no member of the legislative branch of the State Government was a party defendant in this suit so that the Order must run against the various members of the executive branch who have the power to do what is prescribed by the Order. These appellants do not believe that the Three-Judge Court would presume to enter an Order against persons who were not within the jurisdiction of the Court.

Turning now to Paragraph 7 of the Judgment Entry, there is contained therein a statement reserving jurisdiction to conduct such further hearings and Orders as may be appropriate or necessary upon the Motion of the Court or any of the parties hereto. It is clear from the wording of the paragraph itself, as well as from events subsequent thereto, that this simple reservation of jurisdiction is such as might be made in any equity Decree, even one pertaining solely to divorce or child custody. It is clear from the Judgment Entry, itself, that no further particular action was contemplated at any given time, and that it could be a matter of months or even years before any other Order might be filed in this case. The appellants believe that it is the generally recognized principle of law that if a De-

cree or Order otherwise meets the requirements of finality, a reservation in the Order to make further Orders does not destroy the finality of the Decree or Order. *St. Louis, Iron Mountain and Southern Railway Company* v. *Southern Express Company*, 108 U.S. 24, 25 (1883); *French* v. *Shoemaker*, 12 Wall. 86, 98 (1870).

The appellants' position in this respect is confirmed by what did, in fact, happen subsequent to the filing of the Judgment Entry on January 14, 1964. The only further Orders entered herein were one denying a Temporary Stay Order to these appellants, one refusing a Petition of Intervention by certain members of the Legislature of the State of Iowa, and the Order entitled Memorandum and Judgment filed on March 27, 1964, which is contained in the appendix to the appellees' Motion to Dismiss and/or Affirm. That Order of March 27, 1964, pertains solely to approval of an act of the Legislature of the State of Iowa, passed in the Special Session called pursuant to the Order entered on January 14, 1964, and pertains only to the question of whether the Act passed complied with the requirements of the Judgment Entry of January 14, 1964. An inspection of the Order of March 27, 1964, discloses that jurisdiction was not retained therein to consider any further matters, and further, and most importantly, discloses that no reference is made to the Judgment Entry of January 14, 1964, in the nature of incorporating its provisions therein, and the only matter contained in the Decree at all is that Senate File 1 recently enacted by the 60th General Assembly of the State of Iowa is approved as an interim plan of apportionment. The appellants believe that the Memorandum and Judgment on March 27, 1964, by virtue of the fact that it makes no decision whatsoever on the merits of the cause, and by virtue of the fact that it does not even incorporate the previous Order, confirms the position of

these appellants that the Order of January 14, 1964, now being appealed from, was in fact a final Order and determinative of the matters contained in the Complaint filed by the appellees. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-547 (1949); *Forgay* v. *Conrad*, 6 How. 201, 202-203 (1348); *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940).

The appellees, in their Motion to Dismiss and or Affirm go to great lengths to create the false impression that the notation of probable jurisdiction in this case will create great chaos in the elective process and turmoil among the people of Iowa. These appellants suggest that there is no greater chaos in the elective process than when the duly adopted Constitutional provisions of a State are stricken down and other standards imposed upon the people without adequate guides. The Three-Judge Court, itself, stated: "In the absence of further direction from the Supreme Court of the United States, it is difficult to furnish precise standards for apportionment under Federal Constitutional requirements." (Jurisdictional Statement, p. A7). The primary elections for candidates for the general election in November of 1964 have already been held in the interim plan of reapportionment and the notation of probable jurisdiction will have no bearing whatsoever on the 1964 elections. Another election will not be held until 1966, for the 1967 Session of the General Assembly, and we presume that the matter will be fully disposed of before that time.

The present appellants are three of the named original defendants, all of whom were joined as representatives of their entire class, and are appealing from the Judgment entered as representatives of their class as well as representatives of all of the people of Iowa who are interested in protecting the validity of their Constitution. All of the defendants were originally represented by the Attorney

General of the State of Iowa, now an announced candidate for the office of Governor of the State, and who has refused to appeal the decision of the Three-Judge Federal District Court striking down the Iowa Constitution. As the Court is well aware, the Attorney General and the parties whom he represents, have taken no position on this Appeal and are neither supporting nor resisting it. This factor does not make the questions involved any less substantial than they were at the time that these appellees filed their Complaint in this matter.

## CONCLUSION

In summary and conclusion, the appellants feel that a review of the decision in question, together with the Memorandum Opinion of the same date, and considering the background of this case, bearing in mind the parties involved, can lead to no conclusion but that the Order being appealed from is a final Order granting a permanent injunction within the requirements of 62 Stat. 926, 28 U.S.C., Section 1253. The appellants believe that the case is now properly before the Supreme Court of the United States, and that probable jurisdiction of this matter should be noted. The appellants believe that on the hearing of the matter, after Briefs have been submitted, they will ultimately prevail, and that the case will be reversed.

The appellants believe that the allegation of the appellees that no substantial questions are presented is frivolous and absurd. The appellants further believe that it is clear under the law that the cases now pending before this Honorable Court will have no bearing, whatsoever, upon the decision being appealed from, since a refusal to hear and determine this case will amount to an affirmance of the decision of the Three-Judge Court, and will be binding

upon the people of the State of Iowa forever, regardless of what decisions may be reached in the cases of the other States.

Respectfully submitted,

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